Supreme Court, U.S.
FILED
MAR 01 2000
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(2)

No. 99-603

IN THE

Supreme Court of the United States

LEGAL SERVICES CORPORATION,

Petitioner,

v.

CARMEN VELAZQUEZ, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Second Circuit was correct in invalidating a congressional appropriations rider that authorizes legal services attorneys to represent indigent persons in cases seeking the award of welfare benefits, but bars those attorneys from calling to courts' attention possible constitutional or statutory defects in welfare benefits laws? Specifically:

1. Whether the ruling of the Second Circuit was correct on the ground that the Legal Services Corporation regulations — which permit, in very limited circumstances, a Legal Services Corporation grantee to create an affiliated organization to undertake activities otherwise prohibited by the federal restrictions — are invalid because they conflict irreconcilably with the statute which absolutely bars non-federally funded legal services lawyers from challenging the legality of welfare laws, in violation of settled First Amendment case law?

2. Whether the ruling of the Second Circuit was correct on the statutory ground that, properly construed, the interaction between the 1996 Appropriations Rider and the text of the Legal Services Corporation Act does not require legal services attorneys to refrain from contesting the constitutionality or legality of welfare laws in settings where such a betrayal of a client's interests would be ethically intolerable?

3. Whether the ruling of the Second Circuit was correct on the ground that the prohibition against legal services lawyers challenging the constitutionality of welfare-related statutes constitutes government viewpoint discrimination in violation of the First Amendment?

4. Whether the ruling of the Second Circuit was correct on the ground that, by permitting legal services lawyers to litigate welfare benefits cases but barring them from calling to courts' attention possible constitutional or statutory defects in welfare benefits laws, the challenged restriction attempts to skew the courts' decisional processes in favor of the federal government, in violation of the separation of powers mandated by the Constitution?

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OPINIONS BELOW

The opinion of the court of appeals (United States Pet. at 1a-41a) is reported at 164 F.3d 757. The memorandum and order of the district court (United States Pet. at 42a-84a) are reported at 985 F. Supp. 323.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on January 7, 1999. Petitions for rehearing timely filed by the Legal Services Corporation (LSC) and Carmen Velazquez, et al., were denied on July 8, 1999. On October 6, 1999, Carmen Velazquez, et al., and LSC, filed with this Court timely petitions for certiorari seeking review of aspects of the court of appeals' decision. On December 6, 1999, the United States — which had joined the litigation as defendant-intervenor in the court below because the constitutionality of a federal statute was at issue — filed a petition for a writ of certiorari supporting the position of LSC.

Carmen Velazquez, et al., filed a brief in opposition to the United States' petition on January 5, 2000. Then, on February 1, 2000, this Court issued an order directing Carmen Velazquez, et al., to file a response to the petition of LSC. This brief is filed pursuant to the February 1 order and this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In 1974, Congress established LSC, a quasi-independent federally chartered corporation vested with responsibility for disbursing federal funds for the purpose of providing legal representation for the poor in civil cases. Aware that federally

funded lawyers for the poor would often be obliged to challenge actions or policies of one or another layer of government on behalf of their indigent clients, Congress self-consciously tailored the Legal Services program to minimize the risk of government interference with the exercise of independent, zealously loyal legal representation. Congress rejected the model of a centrally controlled federal legal aid bureaucracy, opting instead to channel federal subsidies to a broad array of private, locally governed independent entities committed to providing vigorous legal representation to the poor.

Moreover, as the United States accurately noted in its petition for a writ of certiorari, Congress from the beginning required LSC-funded lawyers to conform to the highest ethical standards of the profession. (United States Pet. at 6.) For the past quarter-century, the LSC Act has provided that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession." 42 U.S.C. § 2996(6). The Act also provides that LSC

> shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association. . . . The Corporation shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities.

42 U.S.C. § 2996e(b)(3).

From 1974 to 1996, Congress ensured that government-imposed practice restrictions on LSC-funded lawyers did not collide with the statutorily mandated duty of zealous representation by explicitly providing for an ethical override in connection with certain practice restrictions,[1] and by permitting supplemental state funds and private donations to be used to provide a full spectrum of legal representation when necessary.

In 1996, however, Congress enacted the appropriations riders at issue in this case, significantly increasing the scope of practice restrictions imposed on LSC-funded lawyers and, for the first time, extending the practice limitations to non-federally funded representation. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321-55 (1996 Appropriations Rider). Under the literal wording of the 1996 Appropriations Rider, LSC-funded lawyers appeared to be absolutely barred from engaging in a wide range of lawyering tasks, even when the tasks were carried out with non-federal funds. *See* 1996 Appropriations Rider, § 504(d)-(e). Under litigation pressure, LSC issued interpretive regulations purporting to construe the apparently absolute bans as authorizing Legal Services programs to provide otherwise forbidden forms of legal representation using non-federal funds so long as the non-federally funded legal program is sufficiently separate from the legal program receiving federal aid. *See* 45 C.F.R. § 1610.

The petitions of the LSC and the United States in this case do not discuss the onerous restrictions imposed by the

1. For example, the statutory ban on using LSC funds to influence agency or legislative action is subject to an explicit ethical override when necessary to represent an eligible client. *See* 42 U.S.C. § 2996f(a)(5).

1996 Appropriations Rider on lawyering services provided by LSC aid recipients using non-federal funds. Rather, they seek review of a decision by a majority of the panel of the Second Circuit, written by Judge Pierre Leval, holding that Congress may not forbid LSC-funded lawyers — who are explicitly authorized to represent indigent clients seeking welfare benefits — from challenging the constitutionality or legality of statutes or regulations that prevent such clients from receiving benefits.[2] This restriction is particularly damaging in this era of welfare reform and devolution, for states are experimenting with a wide range of welfare responses — some of them far more punitive and arbitrary than Congress could have contemplated — and this provision purports to bar lawyers for the poor whose offices receive federal money from questioning whether state implementing regulations transgress statutory or constitutional standards.

Judge Leval reasoned that although government has broad discretion in deciding what programs to fund, it may not exercise its funding power to permit only one viewpoint to be expressed, especially in the context of an adversary legal proceeding where the integrity of the judicial process depends upon the ability to present all available legal arguments to the court. In effect, noted Judge Leval, the restriction on challenging the constitutionality or legality of a welfare statute allows a federally funded Legal Services lawyer to support the legal status quo, but forbids the lawyer

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2. The related petition for certiorari filed by Carmen Velazquez, et al., challenges, among other things, the constitutionality of requiring local LSC-funded programs to establish immensely wasteful and inefficient "physically separate" legal programs in order to use private funds to provide indigent clients with a full spectrum of legal representation. *See Velazquez v. Legal Servs. Corp.*, No. 99-604.

from arguing that the government-imposed status quo is unlawful or unconstitutional. Judge Leval held that such a restriction on the ability of a federally funded lawyer to advance a client's legal interests in court violates the First Amendment ban on government-imposed viewpoint discrimination. (United States App. 32a-35a.)

Judge Jacobs dissented, arguing that the power of government to decide what programs to fund necessarily includes the power to define the federally funded Legal Services program to include representation of indigent clients seeking welfare benefits under existing law but to exclude challenges to existing law as outside of the scope of the defined program — even when the existing law is alleged to violate federal constitutional or statutory requirements. (United States App. 46a-48a.) Judge Jacobs' reasoning, adopted in large part by LSC and the United States in their petitions, reduces First Amendment restrictions on government funding to a tautology, permitting government to respond semantically to virtually any First Amendment challenge to funding restrictions by characterizing the restrictions as the defining parameters of the government's program.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION URGED BY PETITIONERS IS NOT APPROPRIATE FOR CERTIORARI REVIEW

A. The Principle of Constitutional Avoidance Counsels Against this Court Reviewing the First Amendment Viewpoint Discrimination Issue Raised by Petitioners in Light of the Unambiguous Alternative Grounds Supporting the Ruling Below

LSC and the United States in their petitions both seek review of the Second Circuit's ruling that invalidated on First Amendment viewpoint discrimination grounds the 1996 Appropriations Rider's bar against questioning the legality of welfare laws in the course of cases challenging wrongful denials of benefits. However, that viewpoint discrimination ruling — while doctrinally correct — is not an appropriate subject for certiorari review since it presents certain novel questions of First Amendment doctrine and there exist at least two unambiguous alternative grounds supporting the same outcome — *i.e.*, that the restriction in question is invalid and unenforceable. In view of this Court's principle of constitutional avoidance, *see, e.g., Leroy v. Great Western United Corp.*, 443 U.S. 173, 181 (1979) ("As a prudential matter it is our practice to avoid the unnecessary decision of novel constitutional questions."), the question urged by LSC and the United States is not appropriate for review by this Court.

1. The Ruling Below is Correct on the Alternative Ground That the LSC Implementing Regulations Are Invalid and, Stripped of the Regulations, the 1996 Appropriations Rider Is Plainly Unconstitutional Under *FCC v. League of Women Voters*

The first of these two unambiguous alternative grounds supporting the result below follows from the fact that the "interpretive" regulations issued by LSC in the course of the district court litigation are invalid because they conflict squarely with the statute that they purport to implement. The 1996 Appropriations Rider's plain language unequivocally bans recipients of LSC funds from using non-federal funds to engage in the categories of activities prohibited under the appropriations rider. Nowhere in the congressional text or legislative history is there any hint that Congress wished to authorize LSC fund recipients to establish parallel programs to use non-federal funds to engage in prohibited activities. To the contrary, the section-by-section analysis of the Senate bill that became the 1996 Appropriations Rider expressly states: "The legislation prohibits the use of alternative corporations to avoid or evade the provisions of the law." S. Rep. No. 104-392, at 26 (1996).[3]

3. *Rust v. Sullivan* teaches that when Congress wishes to authorize use of separate programs to ensure that federal funds are not used for prohibited activities, Congress knows how to do so. 500 U.S. 173 (1991). In the Title X family planning program at issue in that case, Congress explicitly distinguished between the specific "projects" funded by Title X and the "grantees," which undertook the "projects." The restrictions challenged in *Rust* applied only to the "projects." *See* 500 U.S. at 196. There is no attempt to make such a distinction in the 1996 Appropriations Rider, which is explicitly aimed at LSC fund "recipients." *See* 1996 Appropriations Rider, § 504. Thus, LSC is in the legally untenable position of attempting to replicate the *Rust* regulations, but without the *Rust* statutory authorization.

But in *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984), this Court squarely held that the First Amendment does not tolerate such absolute bars on the use of private funds to pursue constitutionally protected advocacy. LSC's regulations attempt to remedy this obvious and deliberate constitutional offense by rewriting the statute so as to permit private funds to be expended for restricted activities — albeit, only through an unacceptably burdensome and wasteful "physically separate" program. But under *Chevron USA Inc. v. Natural Resources Defense Council*, courts "must reject administrative constructions which are contrary to clear congressional intent." 467 U.S. 837, 843 n.9 (1984). Neither agencies nor courts are "free to redraft statutory schemes in ways not anticipated by Congress solely to avoid constitutional difficulties," *Lowe v. Securities & Exch. Comm'n*, 472 U.S. 181, 213 (1985) (White, J., concurring), and so LSC's regulation is invalid because it "materially deviates from the legislative plan," *id.*, that it purports to implement. Additionally, as LSC is an independent corporation and outside of the executive branch, its regulations are not due the same degree of deference as those of an executive agency. *See Chevron*, 467 U.S. at 866 (deference to administrative interpretation derives from "Constitution['s] vest[ing of] . . . responsibilities [for assessing the wisdom of policy choices] in the political branches"). Stripped of these unauthorized regulations, what remains is the 1996 Appropriations Rider's patently unconstitutional absolute prohibition on expenditure of even private funds for restricted purposes. The obvious unconstitutionality of this provision under *League of Women Voters*, 468 U.S. at 400, is an alternative and legally unambiguous ground supporting the result below — and thus a reason why the novel First Amendment question urged by LSC and the United States is inappropriate for review by this Court.

2. The Ruling Below is Correct on the Alternative Statutory Ground That, Properly Construed, the 1996 Appropriations Rider and the LSC Act Do Not Always Bar LSC-Funded Attorneys from Challenging the Constitutionality or Legality of Welfare Laws

Moreover, certiorari review of the Second Circuit's viewpoint discrimination ruling is that much more unnecessary because the result below is correct on yet another alternative ground: that, properly construed, the interaction between the 1996 Appropriations Rider and the text of the LSC Act does not require LSC-funded attorneys to refrain from contesting the constitutionality or legality of welfare laws in settings where such a betrayal of a client's interests would be ethically intolerable.

As the United States correctly notes in its petition (United States Pet. at 6 n.2), the LSC Act requires LSC-funded attorneys to adhere to the highest ethical standards. *See* LSC Act, 42 U.S.C. § 2996(6) ("[A]ttorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession."); § 2996e(b)(3) (LSC "shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association. . . . [LSC] shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities."); § 2996f(a)(1) (LSC must "insure the maintenance of the highest quality of service and professional standards, the

preservation of attorney-client relationships, and the protection of the integrity of the adversary process from any impairment in furnishing legal assistance to eligible clients."). An appropriations rider that explicitly permits an LSC-funded lawyer to undertake the representation of an indigent client but forbids the lawyer from advancing crucial legal arguments on behalf of that client is in clear tension with the text of the LSC Act that mandates compliance with ethical norms. It is possible, of course, to resolve the tension by reading the 1996 Appropriations Rider — which says nothing about ethical obligations — as impliedly repealing those provisions of the LSC Act that mandate compliance with the Canons of Ethics and the Code of Professional Responsibility. But such a misreading would violate this Court's well established rule that an appropriations rider should not be construed to repeal substantive statutory provisions by implication. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189 (1978); *see also* House Rule XXI(a)(i); Standing Rules of the Senate, Rule 16.2 (forbidding substantive amendments through appropriations riders).

Rather, the practice restrictions imposed by the 1996 Appropriations Rider should be read in conjunction with the overriding command in the statutory text that LSC-funded lawyers act in accordance with ethical obligations. Thus, in those settings where compliance with welfare practice restrictions described in the 1996 Appropriations Rider would result in a violation of the Canons of Ethics (for example, because adequate alternative counsel for an indigent client is unavailable), respect for the text of the LSC Act requires that LSC-funded lawyers be permitted to act in accordance with the ethical precepts of the American legal

profession without jeopardizing the funding of their legal programs.[4]

As with the patent unconstitutionality of the 1996 Appropriations Rider's purported restrictions on the use of non-federal funds, this construction of the statute offers an independently adequate alternative ground that should make Supreme Court review unnecessary. For, even if the 1996 Appropriations Rider were upheld, LSC-funded lawyers should be able to challenge welfare laws and regulations in instances where their ethical obligations make such advocacy essential. In view of these multiple bases for the ruling below, prudential concerns counsel strongly against this Court's deciding the difficult First Amendment viewpoint discrimination question urged by petitioners.

B. The Ruling Below Does Not Conflict with the Decision of the Ninth Circuit in *Legal Aid Society of Hawaii v. Legal Services Corporation*

Petitioners' suggestion that Judge Leval's decision below is in conflict with the decision of the Ninth Circuit in *Legal Aid Society of Hawaii v. Legal Services Corporation*,

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4. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-399 (1996). The ABA ethics opinion suggests that an LSC lawyer should, first, seek to comply with practice restrictions imposed by the 1996 Appropriations Rider by obtaining adequate alternative counsel. When adequate alternative counsel is unavailable, the opinion acknowledges that, in the absence of an ethical override, a LSC-funded lawyer would be placed in the untenable position of balancing the needs of a present client against the needs of future clients who would be harmed by a cut-off of funds. The ethics opinion makes clear that a client may never be asked to consent in advance to future representation that may prove inadequate.

145 F.3d 1017 (9th Cir), *cert. denied*, 119 S. Ct. 539 (1998), is unpersuasive. The plaintiffs in that case attacked the 1996 Appropriations Rider only insofar as it limited the use of non-federal funds by Legal Services grantees; they disclaimed any challenge to restrictions imposed upon LSC-funded attorneys who are paid out of federal funds. The instant suit raises this unaddressed issue. Accordingly, the Ninth Circuit did not squarely address the central issue raised by the petitions for certiorari of LSC and the United States: the constitutionality of substantive limits placed on the ability of federally funded lawyers to advance crucial legal arguments on behalf of a client.

II.

THE QUESTION URGED BY PETITIONERS WAS CORRECTLY DECIDED BELOW

A. The Prohibition Against Challenging Welfare Laws Constitutes Impermissible Government Viewpoint Discrimination in Violation of the First Amendment

The question urged by petitioners is inappropriate for certiorari review, not just because there exist alternative grounds supporting the same result and there is no actual circuit split on the issue, but also because the Second Circuit's decision invalidating the 1996 Appropriations Rider's prohibition against challenging welfare laws was correct. This one-sided restriction aimed at insulating state and federal welfare rules from judicial review by preventing LSC-funded lawyers from calling possible legal defects to courts' attention blatantly transgresses the First Amendment's prohibition against government viewpoint discrimination.

The petitions for certiorari filed by LSC and the United States both seriously misread the governing precedents of *Rust v. Sullivan*, 500 U.S. 173 (1991), and *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), and fail to recognize the crucial fact that while they operate with federal subsidies, LSC-funded lawyers do not speak for the government when representing low income clients. Both LSC and the United States read *Rust v. Sullivan* so broadly as to reduce First Amendment challenges to restrictions imposed by government funding statutes to a tautological process trivializing the First Amendment. At the same time, LSC and the United States read the more recent decision of the Court in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), which unanimously struck down a government effort to use the funding power to suppress a disfavored viewpoint, so narrowly that the decision is drained of virtually all precedential value.

In *Rust*, this Court upheld a restriction on the discussion of abortion by doctors employed in a government-funded family planning clinic. The *Rust* majority reasoned that, in the context of the family planning clinic program, the clinic doctor was really a spokesperson for the government and could, therefore, be confined to disseminating the government's desired message. 500 U.S. at 192-94. Moreover, reasoned the *Rust* majority, the extremely narrow form of medical service provided by a family planning clinic doctor prevented the emergence of a "traditional" doctor-patient relationship that might well have been entitled to a greater degree of First Amendment protection. *See id.* at 200. Since the doctor in *Rust* was treated as a mouthpiece for the government, and since the doctor's interaction with patients was narrowly confined to a sliver of the "traditional" doctor-

patient relationship, the *Rust* majority held that limiting the doctor's speech about abortion did not violate the First Amendment. *See id.*[5]

This case is controlled not by *Rust* but by the Court's more recent decision in *Rosenberger*. In *Rosenberger*, the University of Virginia subsidized a broad array of secular student publications, but declined to provide similar subsidies to those that were religiously oriented. 515 U.S. at 824-25. Virginia sought to defend its decision to subsidize secular but not religious speech by arguing that its subsidy "program" was self-consciously confined to speech about secular subjects, just as *Rust*'s was confined to speech about family planning. *See id.* at 830-31. This Court rejected Virginia's effort in *Rosenberger* to engage in such a definitional dodge, holding that First Amendment limits on government funding restrictions cannot be reduced to a semantic tautology, especially in settings where the government is not the true speaker, but is subsidizing the speech-related activities of a broad array of private speakers. *See id.* at 834-35.

In this case, LSC and the United States merely recycle Virginia's discredited arguments. The United States proceeds

5. Justice Souter cast the crucial fifth vote supporting the 5-4 majority opinion in *Rust*. In his dissent in *National Endowment for the Arts v. Finley*, Justice Souter later stressed that "outside of the contexts of government-as-buyer and government-as-speaker, we have held time and time again that Congress may not 'discriminate inviduously in its subsidies in such a way as to aim at the suppression of . . . ideas." 118 S. Ct. 2168, 2185 (1998) (*quoting Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1997)). Similar to its support for the arts channeled through the National Endowment for the Arts, the government neither speaks nor buys anything for itself through the funding it provides through LSC. *Cf. Finley*, 118 S. Ct. at 2190.

as though the government were the true "speaker" in this case, using LSC-funded lawyers as spokespersons to convey a pre-selected government message the way doctors were used in *Rust*. But, as in *Rosenberger*, here Congress has elected to subsidize the speech-related activities of numerous private persons in order to enable poor litigants to oppose the government effectively in court. Unlike the doctors in *Rust*, lawyers who are subsidized in order to permit them to assist indigent clients in challenging the government in court cannot plausibly be characterized as government mouthpieces parroting the government's line.

Indeed, this Court has elsewhere taken pains to clarify that while state-funded doctors may be regarded as simply agents implementing a government program, state-funded lawyers who must frequently challenge the government in court cannot be viewed as speaking for the government. In *Polk County v. Dodson*, the Court held that criminal defendants may not bring suit under 42 U.S.C. § 1983 against government-subsidized public defenders because public defenders do not act under color of state law. 454 U.S. 312, 321 (1981). Publicly funded doctors may be liable under § 1983, the Court reasoned, because "state-employed doctors . . . face[] their employer in a very different posture than does a public defender." *Id.* at 320. In certain circumstances, "physicians assume an obligation to the mission that the State . . . attempts to achieve," *id.*, while public defenders are adversaries of the government who "work[] under canons of professional responsibility that mandate [their] exercise of independent judgment on behalf of the client." *Id.* at 321.

As in *Dodson*, the rules of professional responsibility require LSC-funded attorneys to use every tool and argument at their disposal to represent vigorously their clients who

sue the government for wrongful denial of welfare benefits. In fact, as discussed above, the LSC Act obliges LSC-funded attorneys to honor their ethical responsibilities to their clients, and specifically mandates that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession." 42 U.S.C. § 2996(6). Thus, unlike the doctors discussed in *Rust*, 500 U.S. at 193-94, and *Dodson*, 454 U.S. at 319-20, LSC-funded lawyers cannot be treated as conveying a government message because their ethical obligations flatly prohibit such divided loyalty.

LSC and the United States also proceed as though it is legitimate to subsidize pro-government speech, while withholding support from anti-government speech. One hopes that if Congress defined the LSC-funded program to encompass aid to indigent Democrats — but not indigent Republicans — LSC and the United States would recognize that the First Amendment limits the power of the government to "define" its subsidy program. The decision to subsidize lawyers' speech where they defend the legal status quo, but to forbid speech that might question its constitutionality, is scarcely less offensive than the patently unlawful discrimination between Republicans and Democrats. In both settings, government is using its funding power to advance a favored political viewpoint and to retard a disfavored one.

Nor does the suggestion that courts are not public fora provide a basis for distinguishing *Rosenberger*.[6] The cases

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6. This argument was raised by the United States in its petition (United States Pet. at 19-20), but is not advanced by LSC.

cited earlier by the United States in support of this proposition demonstrate that the government has failed to appreciate the crucial difference between permissible regulation of courtroom behavior and impermissible and unconstitutional restrictions upon the free flow of argument and information to the court. *Kelly v. Municipal Court*, 852 F. Supp. 724, 734-35 (S.D. Ind. 1994), *aff'd*, 97 F.3d 902 (7th Cir. 1996), and *Zal v. Steppe*, 968 F.2d 924, 932 (9th Cir. 1992) (Trott, J., concurring), cited by the United States in its brief, stand for nothing more remarkable than the proposition that a judge enjoys broad discretion to regulate in-court speech and conduct so that judicial business may be conducted efficiently and fairly. The ability to present legal argument to the court, implicated by the restrictions in the 1996 Appropriations Rider, is not subject to such broad regulation. The integrity of the judicial process depends on the flow of information and argument to the court remaining free from government restrictions designed to favor one side in the adversary process. A court need not be characterized as a classic public forum in order to recognize that government efforts to manipulate the permissible content of counsel's argument on the basis of viewpoint are utterly corrosive of a fair adversary process.[7]

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7. Indeed, the First Amendment prohibits viewpoint discrimination even in locations or under government programs (including courtrooms) that have been deemed wholly nonpublic fora. *See International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 687 (1992) (even in nonpublic fora, restrictions on speech cannot constitute "an effort to suppress expression merely because public officials oppose the speaker's view") (O'Connor, J., concurring) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)); *Berner v. Delahanty*, 129 F.3d 20, 28 (1st Cir. 1997) (even in a case involving the courtroom, the state

(Cont'd)

B. The Prohibition Against Challenging Welfare Laws Violates Separation of Powers

Moreover, the Second Circuit's ruling invalidating the welfare challenge provision is correct on the additional ground that, in attempting to impose this restriction on arguments that may be brought to the attention of courts, Congress has violated the constitutional principle of separation of powers. The Constitution's separation of powers imposes two separate but related limits on Congress' power to control the judicial branch in the performance of its fundamental duty to adjudicate cases. First, while Congress may alter in various ways the basic jurisdiction of federal courts, when Congress does confer jurisdiction it may not interfere with the courts' fundamental duty to interpret the Constitution. *See City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 2172 (1997) (Congress may not overrule federal court's interpretation of Constitution); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Second, Congress may not mandate a "rule of decision" designed to dictate the specific outcome of cases pending before federal courts. *See United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

(Cont'd)

may not "[p]ick and choose among similarly situated speakers in order to advance or suppress a particular ideology or outlook" or to "curb[] speech of which [officials] disapprove"); *East Timor Action Network, Inc. v. City of New York*, No. 99 Civ. 3664, 1999 WL 1000949 (S.D.N.Y. Nov. 4, 1999) (holding unconstitutional government's viewpoint-based exclusion of particular political faction from city program to erect temporary street signs recognizing particular persons or causes).

The congressional restriction barring LSC-funded lawyers from challenging welfare laws transgresses these two bedrock principles. By authorizing federally funded Legal Services attorneys to represent clients seeking relief from welfare agencies but barring them from calling to courts' attention the possible unconstitutionality of state or federal welfare regulations or statutes, Congress interferes with the duty of federal courts to resolve constitutional questions presented in such welfare cases — cases over which Congress has granted the courts subject matter jurisdiction under the federal question statute, 28 U.S.C. § 1331. The restriction effectively prevents federal courts from adjudicating these constitutional issues, because clients who are unable to find replacement counsel will either have to proceed with a federally funded lawyer who is barred from raising these arguments or must resort to proceeding pro se — an avenue that offers little hope as a means for securing a thorough airing and adjudication of complex constitutional questions.

Second, the restriction similarly violates the Constitution's separation of powers because it is intended to establish a "rule of decision" enabling Congress to preclude constitutional arguments that could otherwise lead to the invalidation of welfare laws. Indeed, the 1996 Appropriations Rider's legislative history amply demonstrates that this was Congress' desired result. *See, e.g.*, 142 Cong. Rec. H8149-04, 8179 (daily ed. July 23, 1996) (Rep. Burton stating: "The LSC is fighting the welfare reform plan in Wisconsin . . . even though this Congress and the President of the United States . . . support it. Why are taxpayers' dollars being used to fight the very things we think are important?").

At issue in *Klein* was Congress' attempt to affect the outcome of pending litigation by directing federal courts to give a specified congressionally defined evidentiary weight to a presidential pardon. Invalidating the statute, this Court instructed that Congress may not govern the method of deciding a case before federal courts as a means of influencing the outcome of cases. 80 U.S. (13 Wall.) at 146-47; *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). By barring LSC-funded challenges to welfare laws, Congress now similarly attempts to achieve a desired litigation result by manipulating the applicable ground rules — here, by forcing the withdrawal of counsel whenever a constitutional question might be raised regarding a welfare law. The damage to federal courts' structural integrity is at least as grave as that in *Klein*. And in both cases, Congress violates the Constitution's separation of powers.

III.

IF THIS COURT IS INCLINED TO GRANT REVIEW, IT SHOULD GRANT ALL OF THE PETITIONS IN ORDER TO HAVE BEFORE IT THE COMPLETE 1996 APPROPRIATIONS RIDER AT ISSUE IN THIS CASE

There is thus no need for Supreme Court review of the portion of Judge Leval's opinion that carefully and correctly interprets this Court's precedents and recognizes that government may not use the funding power to impose viewpoint based restrictions on the free flow of argument needed to ensure the integrity of the judicial process. But if this case is worthy of certiorari review, it can only be because it raises the issue of the sorts of restrictions that the government may attach to public subsidies in the unusual and sensitive context of government funding for lawyers

representing indigent persons in matters adverse to the government. However, granting review of just one piece of the complex web of restrictions imposed under the 1996 Appropriations Rider would make it difficult for the Court to appreciate the peculiar harms that they cause in combination. Only by examining the full range of conditions and restrictions that Congress imposed — subject matter limitations, restrictions on using certain generally available procedural tools of lawyering, and bars against calling certain issues and arguments to courts' attention — can this Court fully assess their impact and understand the context in which the legal issues arise. Respondents therefore urge that, in the event that this Court is inclined to grant review, it should grant review of all of the petitions filed in this matter — *Legal Servs. Corp. v. Velazquez*, No. 99-603, *Velazquez v. Legal Servs. Corp.*, No. 99-604, and *United States v. Velazquez*, No. 99-960 — in order to have before it the complete set of restrictions at issue in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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